

D.P.U. 91-DS-48

Adjudicatory hearing in the matter of a possible violation of General Laws, Chapter 82, Section 40, by East Coast Equipment Corporation.

APPEARANCES: Richard Roach, Vice President
East Coast Equipment Corporation
Box 247 at 492 East Broadway
South Boston, Massachusetts 02127
FOR: EAST COAST EQUIPMENT CORPORATION
Respondent

Mario Reid, Compliance Officer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On August 21, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to East Coast Equipment Corporation ("Respondent" or "East Coast"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on June 10, July 3, and July 5, 1991 on N Street in South Boston, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The NOPV stated that the Respondent failed to exercise reasonable precaution, causing damage to underground gas lines operated by Boston Gas Company ("Boston Gas" or "Company"). The NOPV indicated that the Respondent had the right to either appear before a Division hearing officer in an informal conference on September 11, 1991, or send a written reply to the Division by that date.

On September 11, 1991, the Respondent met with the Division during an informal conference. In a letter dated November 6, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On November 15, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R., § 99.07(3). After due notice, an adjudicatory hearing was held on October 28, 1992, pursuant to the Department's procedures for enforcement of the Dig-Safe Law under 220 C.M.R., § 99.00 et seq.

At the hearing, Mario Reid, a compliance officer, appeared on behalf of the Division. Julio Fernandes, a district inspector for Boston Gas, and James Giles, a special representative in

the Company's Legal Services Department, testified on behalf of the Division. Richard Roach, vice president of East Coast, testified for the Respondent. All exhibits offered were moved into evidence by the Department. The Respondent submitted one response to a Department record request.

II. SUMMARY OF FACTS

A. The Division

The Division presented evidence that the Respondent damaged three separate underground gas lines operated by Boston Gas while excavating on N Street in South Boston on June 10, July 3, and July 5, 1991 (Tr. at 7-8; Exhs. Div.-1, Div.-2, Div.-3). The locations of the damage were 105 N Street, the intersection of N and East Seventh Street, and 159 N Street (id.). In each case, the damage was caused by a backhoe (Tr. at 36; Exhs. Div.-1, Div.-2, Div.-3).¹ The Division alleges that in each case the cause of damage was the Respondent's failure to use reasonable precaution (Tr. at 6-7).

The Division stated that on May 21, 1991, Boston Gas was notified by Dig-Safe System, Incorporated ("Dig-Safe")² to mark N Street at "the intersection of East Fourth Street [and] from East Fourth to Columbia Road" at the request of East Coast, which would be replacing a water

¹ The Division's witnesses, Mr. Fernandes and Mr. Giles, testified that neither viewed the sites at the time of the damage (Tr. at 39). Their statements and assertions were based on damage reports prepared by Company employees who were not called to testify.

² Dig-Safe is a non-profit organization that exists for the express purpose of gathering information on proposed excavations from excavators, and disseminating that information to utility companies so that they can properly mark their underground facilities before excavation begins. See G.L. c. 164, § 76D.

main on that street (Tr. at 9; Exh. D-4). Mr. Fernandes testified that he completed the markings at 159 N Street and the intersection of N Street and East Seventh Street on May 24, 1991, and at 105 N Street on May 28, 1991 (Tr. at 20, 24; Exhs. Div.-1, Div.-2, Div.-3, Div.-4, Div.-5, Div.-6). To ensure the accuracy of its markouts, Mr. Giles testified that Company personnel conducted checks to verify the accuracy of each markout (Tr. at 42). He stated that if East Coast had questions about the accuracy of a mark or if any marks appeared to be missing, then it was the Respondent's responsibility to notify Boston Gas so that the Company could check the accuracy and completeness of its marks (id. at 49-50).

With regard to the 105 N Street incident, the Division presented evidence that East Coast damaged a one and one-quarter inch service line during excavation with a backhoe on June 19, 1991 (Exh. Div.-1). The Division maintained that the Company had marked "gas" on the curbstone and then used corridor marks to indicate the location of the service line (Tr. at 27). Mr. Giles stated that the Company observed that the markings were visible and correct at the time of the incident (id. at 20, 24; Exh. Div.-1). Mr. Giles testified that the marks were still intact when he visited the site on September 19, 1991 (Tr. at 37).

With regard to the 159 N Street incident, the Division presented evidence that East Coast damaged a one-inch service line during excavation with a backhoe on July 5, 1991 (Exh. Div.-2). Mr. Giles testified that the damage to the gas line occurred in close proximity to the marks (Tr. at 27). He stated that the Company observed that the markings were visible and correct at the time of the incident (id. at 20, 24; Exh. Div.-2). Mr. Giles testified that the markings were still intact when he visited the site on September 19, 1991 (Tr. at 37), and

provided photographs that were taken that day indicating the path of the gas pipe from the street to the building at 159 N Street (id. at 26-27; Exh. Div.-12). The Division submitted a sketch which indicated that the service line leading into the building at 159 N Street continued in a straight line from the gas main in the street (Exh. Div.-10).

With regard to the N and East Seventh Streets intersection, the Division presented evidence that East Coast damaged a four-inch gas main located within the intersection during excavation on July 3, 1991 (Exh. Div.-3). The Division submitted a schematic that showed that the damage occurred at the connection of the four-inch main with a six-inch main (Exh. Div.-10).³ However, Mr. Giles testified that the Company's reports showed that the markings were visible and correct when initially made but were not visible immediately after the excavation, thus, leading Boston Gas to the conclusion that the marks had been obliterated by East Coast during its excavation of the intersection (Tr. at 43-44, 46, 53; Exh. D-3). The Division stated that the Respondent did not call for a re-marking, even though, as Mr. Giles testified, it is required for an excavator to request a remarking when marks are no longer visible (Tr. at 27, 44).

B. The Respondent

As concerns the break of the service line at 105 N Street, Mr. Roach testified that the gas pipe was unmarked at the time East Coast excavated at that address (id. at 54). To corroborate his statement that the service line was unmarked, Mr. Roach submitted a report from Joseph

³ Mr. Giles testified that the four-inch main connected with a six-inch main at the intersection (Tr. at 52-53). Mr. Giles acknowledged later that, in fact, there were two mains located in the intersection which were below and offset from each other. He stated that one of those mains was inactive (id. at 75-76). He also stated that the active main was located below and offset from the inactive main (id.).

Hickson, an inspector for the Boston Water and Sewer Commission ("BWSC Report") (RR-EC-1). Mr. Roach stated that the building at that address had more than one gas service line leading to it from the gas main in the street (Tr. at 54). This, Mr. Roach theorized, was why the Company failed to mark the gas line his workers damaged (id.).⁴

With regard to the 159 N Street damage site, Mr. Roach testified that Boston Gas incorrectly marked the service line leading to that building (id. at 56). He stated that the service line veered five feet from the Company's markings (id.).⁵ In this BWSC Report, Mr. Hickson stated that East Coast damaged a service line at 159 N Street that was "5 feet off mark" (Exh. EC-1).⁶

Mr. Roach testified that an excavator makes an assumption that a gas pipe will continue in a straight line unless the marks indicate a deviation (Tr. at 88). According to Mr. Roach, had the pipe that East Coast damaged continued in a straight line as indicated by the marks, the Respondent's backhoe bucket would have had a two- to three-foot clearance from the pipe (id. at 90).

⁴ Although the report does contain a notation that East Coast damaged an unmarked gas service line on June 10, 1991 on N Street, the report indicates that the service was located at 143 N Street, not 105 N Street (RR-EC-1).

⁵ Mr. Roach stated that he learned of this deviation from his foreman on site that day and from a report prepared by Mr. Hickson (Tr. at 56-57).

⁶ Mr. Hickson did not testify about the contents of his report, and therefore was not subject to cross-examination. The Department will afford this evidence its due weight in light of this failure to testify.

With regard to the damage of Boston Gas' main at the intersection of N and East Seventh Streets, Mr. Roach testified the damage was due to incomplete markings (id. at 62). He testified that in the course of excavating to connect two water mains, East Coast uncovered a four-inch gas main (id. at 62, 79). He stated that East Coast dug by hand to expose that main (id. at 62, 79). Then, after the main had been safely exposed, the Respondent proceeded to excavate the intersection with a backhoe (id. at 77-80). During that excavation, East Coast struck and damaged a second active main -- six inches in diameter -- located underneath the first main and offset by two feet (id. at 62, 69, 79). The second main was located within the boundary of the Boston Gas markings (id. at 81). Mr. Roach explained that the four-inch main was inactive and the damaged six-inch main was active (id. at 66). He stated that the markings at the site did not indicate that there were two Boston Gas mains in the intersection (id. at 62).⁷ To corroborate this contention, Mr. Roach submitted the BWSC Report prepared by Mr. Hickson, which stated that the four-inch main was unmarked (RR-EC-1). Mr. Roach contended that Boston Gas should have identified the second main with a separate mark, and indicated that it was the active main (Tr. at 70).

III. STANDARD OF REVIEW

A. Reasonable Precaution

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use

⁷ Mr. Roach stated that he was present on the day of this excavation and personally viewed the two mains (Tr. at 64).

under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993); Amorello & Sons, supra, at 7-8;

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precautions, adequate support or evidence must accompany that allegation. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6. In

specific instances where there has been an allegation of a failure to exercise reasonable precautions without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

It is undisputed that the Respondent damaged the three Boston Gas utilities in question. The only issue in this case is whether the Respondent failed to exercise reasonable precautions while excavating at 105 N Street, 159 N Street, and the intersection of N and East Seventh Streets, resulting in the damage to three underground utilities.⁸

As concerns the damage at 105 and 159 N Street, the Division presented documentary evidence and testimony that Boston Gas correctly marked the gas service lines prior to the Respondent's excavation, and that the markings were confirmed to have been correct and visible after the breaks. To ensure the accuracy of its markouts, Mr. Giles testified that Company personnel conducted checks to verify the accuracy of each markout. Furthermore, the Division presented a diagram of the gas relay at the 159 N Street site, which confirmed that the service line followed a straight line from the gas main to the building.

⁸ For purposes of determining whether the Respondent violated the Dig-Safe Law, we review these incidents separately. Contrary to the Division's position (Tr. at 22), the Department will not apply evidence cumulatively in this proceeding. The fact that the Respondent damaged three gas lines on N Street during the course of its excavation over a two-month period is not in itself evidence that the Respondent failed to exercise reasonable precautions with regard to each separate incident.

The Respondent contended that the markings were missing at the 105 N Street and incorrect at the 159 N Street (i.e., veered from the mark). Had the markings been complete and correct, the damage to each site would not have occurred, according to Mr. Roach.⁹ He supports his version of the facts with the BWSC Report which stated that the markings were either not present or not accurate. However, we note that the BWSC Report did not support the Respondent's contention that a second service line was present at 105 N Street. In addition, the inspector that prepared the BWSC Report did not testify at the hearing. In contrast, the Division presented witnesses who had laid the original markings and visited the site after the damage occurred. Those witnesses testified under oath that the markings were present before excavations occurred. In addition, those witnesses had visited the site approximately two months after the damage and testified that markings were still visible at that time. The Division presented photographs which supported this testimony.

Having reviewed the record on the issue of the Company's markings at 105 N Street and 159 N Street, we find that those locations were clearly and correctly marked at the time of the excavations. In situations where the markings are clear, it is the excavator's responsibility to be cognizant of the risks in excavating and to adopt an excavating method that is reasonable given the circumstances. Mahoney, supra. Despite the clearly visible markings, East Coast chose to excavate with a backhoe rather than to dig by hand until the gas lines were safely exposed. We

⁹ We note that Mr. Roach made offers to the Division, Boston Gas, and the Department to re-excavate the damage sites to prove that the markings were incomplete or incorrect (Tr. at 57, 63, 71). The better approach for the Respondent, as well as for other excavators, would be to take photographs of the damage site immediately after the damage occurred.

find that such a method of excavation was not reasonable under the circumstances. See Mahoney, supra. Accordingly, the Department finds that the Respondent failed to exercise reasonable precautions when excavating on June 10, 1991 at 105 N Street in South Boston and on July 5, 1991 at 159 N Street in South Boston. Therefore, we find that the Respondent violated the Dig-Safe Law.

The Division also contends that East Coast failed to exercise reasonable precautions while excavating at the intersection of N and East Seventh Streets on July 3, 1991. In support of this contention, the Division presented evidence that the location had been marked by Boston Gas prior to the East Coast excavation. The Respondent did not dispute that the site was marked; however, East Coast contended that the markings were incomplete. The record showed that Boston Gas' markings did not indicate the presence of two gas mains in close proximity to each other within the excavation site, nor did the markings indicate which of the two mains was active. Under the Dig-Safe Law, Boston Gas was responsible for marking all gas mains in that intersection. The Dig-Safe Law does not differentiate between active and inactive underground utilities. The record demonstrates that East Coast took reasonable precautions in exposing and excavating around the first gas main it located in the intersection. Because the second, active main was not marked, we find that East Coast reasonably could not have been expected to take precautions to protect that second gas main. Nor did the Division present any evidence with regard to the kinds of precautions that East Coast could have taken. In specific instances where there has been an allegation of a failure to exercise reasonable precautions without demonstration of precautions the excavator could or should have taken, the Department has found that the mere

fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, supra; Fed. Corp, supra; Albanese Brothers, Inc., supra. Accordingly, under the specific facts of this case, the Department finds that the Respondent did not fail to exercise reasonable precautions when excavating on July 3, 1991 at the intersection of N and East Seventh Streets in South Boston, Massachusetts, and therefore, did not violate the Dig-Safe Law.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That East Coast Equipment Corporation violated the Dig-Safe Law on June 10, 1991 and July 5, 1991, during excavation at 105 N Street and 159 N Street, respectively, in South Boston, Massachusetts; and that East Coast Equipment Corporation did not violate the Dig-Safe Law on July 3, 1991, during excavation at the intersection of N and East Seventh Streets in South Boston, Massachusetts; and it is

ORDERED: That East Coast Equipment Corporation, being a repeat violator of the Dig-safe Law shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).